

10046. Adulteration and misbranding of olive oil. U. S. * * * v. John A. Alban (John A. Alban & Co., Inc.). Tried to the court and a jury. Verdict of guilty. Fine, \$300. (F. & D. No. 14912. I. S. No. 11855-t.)

On September 2, 1921, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against John A. Alban, trading as John A. Alban & Co., Inc., New York, N. Y., alleging shipment by said defendant, in violation of the Food and Drugs Act, on or about July 28, 1920, from the State of New York into the State of Massachusetts, of a quantity of olive oil which was adulterated and misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it contained an appreciable amount of cottonseed oil.

Adulteration of the article was alleged in the information for the reason that a substance, to wit, cottonseed oil, had been mixed and packed therewith so as to lower and reduce and injuriously affect its quality and strength and had been substituted in part for pure olive oil, which the said article purported to be.

Misbranding was alleged for the reason that the statements, to wit, "Prodotti Italiani," "Pure Olive Oil," "Lucca," and "Italia," together with the design and device of a woman draped in the Italian flag, holding an Italian shield, borne on the can containing the article, regarding the said article and the ingredients and substances contained therein, were false and misleading in that they represented that the said article was pure olive oil and that it was a foreign product, to wit, an olive oil produced in the Kingdom of Italy, and for the further reason that the article was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was pure olive oil and that it was a foreign product, to wit, olive oil produced in the Kingdom of Italy, whereas, in truth and in fact, it was not pure olive oil but was a mixture composed in part of cottonseed oil, and it was not a foreign product, but was a domestic product, to wit, an article produced in the United States of America. Misbranding was alleged for the further reason that it was a mixture composed in part of cottonseed oil, prepared in imitation of, and offered for sale and sold under the distinctive name of, another article, to wit, pure olive oil; for the further reason that it was falsely branded as to the country in which it was produced in that it was branded as an olive oil produced in the Kingdom of Italy, whereas it was an article produced in the United States of America; and for the further reason that the said article purported to be a foreign product when not so.

On November 3, 1921, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel the following charge was delivered to the jury by the court (Van Fleet, D. J.):

Gentlemen, the law under which this prosecution is brought is the act known as the Federal Food and Drugs Act of June 30, 1906.

As far as it is pertinent to this case it provides that it shall be unlawful for any person to manufacture within any territory or the District of Columbia any article of food or drug which is adulterated or misbranded within the meaning of this act; and provides that any person who shall violate any provision of this act shall be guilty of misdemeanor, and fixes the punishment.

It further provides that the introduction within any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia of any article of food or drugs which is adulterated or misbranded within the meaning of this act is hereby prohibited, a violation of which is made an offense under the act.

It further provides that, for the purposes of this act, an article shall be deemed to be adulterated, in the case of food:

First: If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second: If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

And, then, it provides something which is not claimed in this case, that it is also against the act to put in any poisonous or any deleterious ingredient which may render any such article injurious to health.

The claim here is that the article of food is adulterated, and for the purposes of this act, an article shall be deemed to be misbranded in the case of food:

First: If it be an imitation of, or offered for sale under the name of, another article.

Second: If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fails to bear the statement on the label of the quantity or proportions of any mixture or deleterious substance mixed therein.

Now, the information which has been filed by the district attorney against this defendant contains two counts, the first of which charges that heretofore, to wit, on the 28th day of July in the year one thousand nine hundred and twenty, at the Southern District of New York, and within the jurisdiction of this court, John A. Alban, trading as John A. Alban & Co., Inc., at the City of New York, State of New York, did ship and deliver for shipment from the City of New York, State of New York, to the City of Lowell, State of Massachusetts, consigned to Klerhos Dimitrakoulakas, certain packages, to wit, a number of cans, each can containing an article of food, which said cans were labeled, marked, and branded as follows, to wit; and then, it gives the legend upon the brand, which is precisely in accord with the exhibit that was put in before you, and which I need not repeat, because it is presented to you for your examination; that said article of food, shipped as aforesaid, was then and there adulterated in that a substance, to wit, cottonseed oil, had been mixed and packed with the article so as to lower and reduce and injuriously affect its quality and strength. Said article was further adulterated in that a substance, to wit, cottonseed oil, had been substituted in part for pure olive oil, which the article purported to be; against the peace and dignity, and so forth, of the United States.

The second count alleges that on the same date, and within this district, and within the jurisdiction of this court, John A. Alban, trading as John A. Alban & Co., Inc., at the City of New York, State of New York, did ship and deliver for shipment from the City of New York, State of New York, to the City of Lowell, State of Massachusetts, consigned to the same individual named in the first count, certain packages, to wit, and then describing them precisely as at first, marked and branded, as more fully described in the first count of this information, and which said description of the first count is, by reference, hereby incorporated in this count, which said article, shipped as aforesaid, was misbranded in that the statements, to wit, "Prodotti Italiani," "Pure Olive Oil," "Lucca," and "Italia," together with the design and device of woman draped in Italian flag holding Italian shield, borne on the can containing the article, regarding the article and the ingredients and substances contained therein, were false and misleading in this, that they represented that said article was pure olive oil, that said article was a foreign product, to wit, an olive oil produced in the Kingdom of Italy, whereas, in truth and in fact, said article was not pure olive oil but was a mixture composed in part of cottonseed oil; said article was not a foreign product, to wit, olive oil produced in the Kingdom of Italy, but was a domestic product, to wit, an article produced in the United States of America. Said article was further misbranded in that it was a mixture composed in part of cottonseed oil prepared in imitation of pure olive oil and was offered for sale and sold under the distinctive name of another article, to wit, pure olive oil. Said article was further misbranded in that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it was pure olive oil and that it was a foreign product, to wit, olive oil produced in the Kingdom of Italy; whereas, in truth and in fact, it was not pure olive oil but was a mixture composed in part of cottonseed oil; said article was not a foreign product, to wit, an olive oil produced in the Kingdom of Italy, but was a domestic product, to wit, an article produced in the United States of America.

And it is alleged that said article was further misbranded in that the label aforesaid purported said article to be a foreign product when not so, against the peace of the United States, and the dignity of the United States.

Now, the defendant has interposed a plea of not guilty to that information, and it being a criminal charge, that of a misdemeanor, his plea puts in issue the averments upon which the Government asks a verdict.

Of course, the rule in criminal cases is one which you well understand. The burden of a plea of not guilty casts upon the Government the necessity of showing by what the law terms a proof beyond a reasonable doubt as to the guilt of the defendant before he can be convicted.

Now, the term reasonable doubt can hardly be defined to you in any clearer manner than those very terms import. It means that the guilt of the defendant must be shown by proof that leaves no reasonable doubt upon the mind of the jurors. There is nothing technical about it at all. It means a substantial doubt, a doubt which would cause a juror to hesitate in an important transaction in his own life. It means that state of the case which satisfies you to a moral certainty of the truth of the charge.

Of course, unless it does this, it is not sufficient upon which to pass a conviction in the case, but it does not mean anything but what it says. It does not mean anything but a reasonable doubt. A reasonable doubt in the sense in which it is used in the law must be a doubt arising upon the evidence in the case, or from a lack of it, and not be the subject matter of mere surmise or conjecture, or some fanciful idea of the jury that greater proof might have been offered.

If the proof in the case is such that it satisfies the minds of the jurors as practical, every-day business men to an extent which would induce them to act upon it if it related to an important affair of their own, then the law deems it proved beyond reasonable doubt, which justifies them in passing upon it, a conviction in a criminal case, and you are not permitted to go outside of the evidence, conjecture something upon which to hang or base a doubt, but you are confined, as I say, to a consideration of it.

Now, the law, as it has been said, does not make the intent with which the thing is done an ingredient. It is like many other statutory offenses. It denounces the act, and it places upon the individual committing the act the necessity of knowing that he is not violating that statute.

In this instance, whether the defendant knew that the article that he was shipping, which he admits having shipped, was not what it was reputed to be by the labels upon the cans, whether he knew that or not, would be no protection against this prosecution, or against his guilt, because the law has denounced the act of shipping in interstate commerce, a misbranded or adulterated article of food.

It is like, precisely like, the proposition that it will not avail a man charged with crime to say that he did not know that such was the law, because it is axiomatic that ignorance of the law does not excuse, and that is because under a Government of laws such as ours, we are all bound, as far as we are all bound as citizens, to know what the law is, at our peril.

You cannot go out and take the life of a man, and say that you did not know it was a crime to do so. The law will not tolerate that. No one can be convicted of crime under such a system, and so with this statutory offense, the matter of intent is not made an ingredient in the offense. Of course, it very frequently arises in cases of this character that the intent can be very easily seen, that of evading the law, but it is not essential that the defendant should have knowledge of the character of thing that he was shipping, if he did, in fact, violate this statute.

Now, that is really the whole question. Was this article, when shipped, of the character that has been testified to by the Government witnesses? Of course, as has been argued by defendant's counsel, if the contents of these cans, or of this particular can which was appropriated and purchased by this officer of the State of Massachusetts, and who subsequently turned its contents over to the Federal authorities, if those contents were changed after it had left the hands of the defendant, if the contents were not obnoxious under the law when it left defendant's hands, and were changed afterwards, of course, the defendant would not be responsible; but, gentlemen, the jury is not permitted to speculate or conjecture as to what might have been done. The question, whether under the evidence, it has to satisfy your minds that this article that was found by the chemist to be adulterated, and found by the chemist to be not what it was reputed to be on the labels at the time it left the defendant's hands, why, of course, this defendant would be guilty.

This law is made for the protection of the public. It is not a law which represents private rights at all. The public, generally speaking, through Congress, has been given the benefit of this protective statute in order that the people shall not have foisted upon them, under misleading labels, and put up in a misleading form, articles of food which are not what they are reputed to be, and which may or may not be deleterious to health, because it makes no difference so far as this particular charge is concerned, that cottonseed oil, the article alleged to have been mixed with the pure olive oil, may not be deleterious. We all know that it is not necessarily so at all, but it

is in many respects nutritious, but that does not affect the question at all, if the fact is that this article was shipped as a mixture of olive oil and cottonseed oil without distinctly branding it as such.

It is not an offense under this statute to mix ingredients that are not deleterious to health. It is not an offense under the statute as to that, but you must represent to the public what you are doing in that respect, that is where the public has got to be protected. You go into a place of business and seek to purchase a particular article, and you have handed to you the thing which is represented to be what you want, and you buy it as such, and in fact, it is not such, and you have been misled into its purchase by a misrepresentation contained in its label. You have been deceived, and you may have been deceived according to the character of the article to your injury by getting something deleterious for that which you sought as nutritious.

Now, that is the purpose of the act, to protect the public against that sort of thing.

I think that is all, unless counsel wish to suggest something.

MR. RISELY: I ask your Honor to charge the jury that good character alone, in conjunction with other evidence, may raise a reasonable doubt in the minds of the jurors.

THE COURT: Well, that is true. It must be taken in a reasonable sense. Good character is no defense to crime at all. Good character, however, is an element which may be laid before a jury, together with all the evidence in the case, from which they will determine the guilt or innocence of the defendant, and it is an ingredient which does go to make in favor of innocence, more or less according to the circumstances, because the law assumes, and it is a perfectly natural reasonable presumption, and you will find that all rules of law that we have to deal with have their origin in reason, in common sense. The law presumes that a man of good character in the trade involved is not as likely to engage in a criminal enterprise, or an enterprise involving an infraction of the law, as a man of bad character. A man shown to have indulged in that sort of thing before,—but there is always a point at which bad conduct commences. We are not all born like Richard, don't you know, with teeth, and we are not bad at our birth. It is a growth, and there is always a point where we depart from the part of rectitude. If we are guilty of doing so and so, good character, to the extent I have indicated, is a factor to be considered by you in passing upon the defendant's guilt.

MR. MC COY: I think the jury would be interested in the penalty attached to this offense.

MR. RISELY: I object to that, your Honor.

THE COURT: I do not think it is anything that the jury have anything to do with. The jury is entitled to know that it is announced by the statute as a misdemeanor, but the penalty is something within the limitation of the statute.

MR. MC COY: The statute specifically limits the penalty for a first offender. This defendant was a first offender.

THE COURT: I did not notice that, but it would not make any difference, Mr. District Attorney. It is not a thing with which the jurors are concerned, and I cannot imagine that the jury will permit themselves to be influenced to find a man guilty because there was a light punishment, but not guilty if it was a heavy punishment. It is something with which they have nothing to do. It is not a matter of evidence, and, therefore, it is not for their consideration. Is there anything else that counsel wish?

MR. RISELY: That is all.

MR. MC COY: That is all.

THE COURT: Now, gentlemen, you will take this case. It is a very simple one upon the evidence. Disabuse your mind of any consideration excepting that which arises from a consideration of the evidence from the stand, and do not indulge in any conjecture as to what the fact might have been, because the facts upon which a man's cause must rest are those that are produced actually in court, and must not be the subject matter of speculation in the minds of the jury. It does not make any difference with you at all what the consequences of the defendant will be. If you are not satisfied of his guilt beyond a reasonable doubt as I have intimated, it is your duty to find him not guilty. If you are satisfied that it is equally imperative, it is your duty to find him guilty.

The jury then retired and after due deliberation returned a verdict of guilty on both counts of the information, and the court imposed a fine of \$300.

C. W. PUGSLEY, *Acting Secretary of Agriculture.*